

## STATE OF ILLINOIS

### ILLINOIS COMMERCE COMMISSION

Cambridge Telephone Company	:	
C-R Telephone Company	:	
El Paso Telephone Company	:	
Geneseo Telephone Company	:	05-0259
Henry County Telephone Company	:	05-0260
Mid Century Telephone Cooperative, Inc.	:	05-0261
Reynolds Telephone Company	:	05-0262
Metamora Telephone Company	:	05-0263
Harrisonville Telephone Company	:	05-0264
Marseilles Telephone Company	:	05-0265
Viola Home Telephone Company	:	05-0270
	:	05-0275
Petitions for Declaratory Relief and/or	:	05-0277
Suspension or Modification Relating	:	05-0298
to Certain Duties under Sections	:	
251(b) and (c) of the Federal	:	(Cons.)
Telecommunications Act, pursuant to	:	
Section 251(f)(2) of that Act; and for	:	
any other necessary or appropriate	:	
relief.	:	

### ORDER

By the Commission:

#### **I. INTRODUCTION**

From April 15, 2005 through May 4, 2005, Cambridge Telephone Company, C-R Telephone Company, El Paso Telephone Company, Geneseo Telephone Company, Henry County Telephone Company, Mid Century Telephone Cooperative, Reynolds Telephone Company, Metamora Telephone Company, Harrisonville Telephone Company, Marseilles Telephone Company, and Viola Home Telephone Company (collectively "Petitioners") each filed with the Illinois Commerce Commission ("Commission") a verified petition requesting extensive relief from certain obligations under the federal Telecommunications Act ("Federal Act"), 47 U.S.C. 151 et seq. Because the petitions are nearly identical, the dockets have been consolidated.

As an initial matter, Petitioners ask the Commission to promptly enter an interim order without hearing staying any obligation they have to negotiate reciprocal compensation or interconnection with Sprint Communications, L.P. d/b/a Sprint Communications Company L.P. ("Sprint") and staying any arbitration proceeding which may arise from Petitioners and Sprint's inability to agree on certain interconnection

matters until these proceedings have concluded. Thereafter, Petitioners seek a declaratory ruling by the Commission, pursuant to 83 Ill. Adm. Code 200.220, finding that they have no duty under Section 251(b)(2) and (5) of the Federal Act to negotiate reciprocal compensation or local number portability and no duty under Section 251(c) of the Federal Act to negotiate interconnection with an indirect transiting carrier or any carrier that does not intend to provide local exchange telecommunications service in their respective local serving areas. In response to an April 21, 2005 legal inquiry by the Administrative Law Judge ("ALJ"), Petitioners clarify the relief they seek by stating that if the Commission does not issue the initial declaratory ruling sought by Petitioners, the Commission should issue a declaratory ruling concluding that Petitioners are exempt from negotiating any terms of interconnection or reciprocal compensation by virtue of their rural exemptions under Section 251(f)(1) of the Federal Act.

If the Commission does not enter either of the declaratory rulings sought by Petitioners, they seek an order, pursuant to Section 251(f)(2) of the Federal Act, suspending or modifying their obligation to negotiate reciprocal compensation or local number portability under Section 251(b)(2) and (5) with an indirect transiting carrier that does not intend to provide local exchange telecommunications service in their respective local serving areas and has no ability to unambiguously identify the traffic it would terminate as "local" to Petitioners. Also pursuant to Section 251(f)(2) of the Federal Act, Petitioners seek a suspension or modification of their obligation to negotiate interconnection under Section 251(c) with a carrier seeking to force them to establish and support a point of interconnection outside of their respective local serving areas. In the event that they are not able to obtain the desired suspensions or modifications under Section 251(f)(2), Petitioners ask that the Commission identify the terms and conditions, including timeframes, under which they may have a duty to negotiate with Sprint.

Only Sprint filed a petition to intervene, which was granted by the ALJ. Commission Staff ("Staff") participated as well. The aforementioned April 21, 2005 inquiry from the ALJ also specified the date by which Staff and any intervenor should respond to the declaratory ruling request. A deadline was also established by which Petitioners should reply to any response from Staff and any intervenor. Sprint offered a response to the ALJ's April 21, 2005 inquiry as well as a response to the merits of Petitioners' declaratory ruling requests. Staff, however, only responded to the ALJ's inquiry and specifically declined to offer any opinion on the substance or merits of the petitions. Petitioners each filed a reply to the responses of Staff and Sprint.

Although Petitioners seek an interim order staying any obligation to negotiate with Sprint, the Commission believes that it can sufficiently address the issues raised by Petitioners in a timely manner with a single order. A Proposed Order was served on the parties. Sprint and Staff each filed a Brief on Exceptions, although Staff did not actually take exception to the Proposed Order. Instead, Staff simply suggested the addition of language indicating that the Commission's conclusions on these dockets are limited to the facts and circumstances of these dockets. Sprint, Staff, and Petitioners each filed a Brief in Reply to Exceptions. Petitioners have no objection to Staff's suggestion. The

Briefs on Exceptions and Briefs in Reply to Exceptions have been considered in the preparation of this Order. At the request of Sprint, the Commission also heard oral argument in these matters on June 9, 2005. In accordance with Section 200.220(h) of the Commission's rules, the Commission disposes of the requests for the declaratory rulings on the basis of the written submissions before it and the June 9, 2005 oral argument.

## II. BACKGROUND

Petitioners are small facilities-based incumbent local exchange carriers ("LEC") providing local exchange services, as defined in Section 13-204 of the Public Utilities Act ("Act"), 220 ILCS 5/1-101 et seq., subject to the jurisdiction of the Commission. Cambridge Telephone Company provides service in the Cambridge and Osco exchanges. C-R Telephone Company serves the Cornell and Ransom exchanges. El Paso Telephone Company serves only the El Paso exchange. Geneseo Telephone Company provides service in the Geneseo and Green River exchanges. Henry County Telephone Company serves the Atkinson and Annawan exchanges. Mid Century Telephone Cooperative, Inc. serves the Ellisville, Altona, Williamsfield, Table Grove, Summum, Fairview, Smithfield, Maquon, Gilson, Victoria, Marietta, Bishop Hill, and Lafayette exchanges. Reynolds Telephone Company serves only the Reynolds exchange. Metamora Telephone Company provides service in the Metamora and Germantown Hills exchanges. Harrisonville Telephone Company serves the Columbia, Dupo Prairie Du Rocher, Red Bud, Renault, Valmeyer, and Waterloo exchanges. Marseilles Telephone Company serves only the Marseilles exchange while Viola Home Telephone Company serves only the Viola exchange. Petitioners each provide service to less than 2% of subscriber lines nationwide. Petitioners are each a "rural telephone company" within the meaning of Section 153(37) of the Federal Act and Section 51.5 of the rules of the Federal Communications Commission ("FCC"). As rural telephone companies, Petitioners each possess a rural exemption under Section 251(f)(1)(A) of the Federal Act from the requirements of Section 251(c) of the Federal Act.

Sprint is an interexchange telecommunications carrier authorized to provide interexchange services throughout Illinois. Sprint is authorized by the Commission to provide resold and facilities-based local exchange telecommunications services as well in those portions of Illinois served by Illinois Bell Telephone Company and Verizon North, Inc. and Verizon South, Inc. According to Sprint's petition to intervene, such local authority was granted in Docket Nos. 96-0141 and 96-0598, respectively. Pursuant to the Order entered in Docket No. 96-0261, Sprint states that it is also authorized to provide resold local exchange services in those portions of MSA-1 served by Central Telephone Company of Illinois ("Centel"). Sprint relates that it received authority to provide local exchange service in those portions of Illinois outside of MSA-1 served by Centel in Docket No. 97-0295. Sprint reports that the Centel exchanges have subsequently been sold to Illinois Bell Telephone Company and Gallatin River Communications L.L.C. Sprint currently is not authorized to provide local exchange services within any of the Petitioners' serving areas. On May 6, 2005, however, Sprint filed an application requesting authority to provide resold and facilities-based local and

interexchange services throughout Illinois. Sprint's application is identified as Docket No. 05-0301.

As indicated above, Petitioners have initiated these proceedings to resolve certain disputes with Sprint. On September 7, 2004, Sprint sent a letter to each Petitioner seeking to begin negotiations for an interconnection agreement pursuant to Sections 251 and 252 of the Federal Act. Over the next few months, Petitioners and Sprint exchanged correspondence intended to focus and clarify the interconnection request. Sprint does not seek to interconnect with Petitioners pursuant to Section 251(c) of the Federal Act. Rather, Sprint wishes to interconnect and exchange traffic pursuant to subsections (a) and (b) of Section 251.

According to Sprint, it seeks interconnection with Petitioners to offer competitive alternatives in telecommunications services to consumers in rural Illinois through a business model in which Sprint provides telecommunications services to other competitive service providers seeking to offer local voice service. With regard to Illinois, Sprint has entered into a business arrangement with MCC Telephony of Illinois, Inc. ("MCC") to support its offering of local and long distance voice services.<sup>1</sup> Sprint states that the relationship enables MCC to enter the local and long distance voice market without having to "build" a complete telephone company. In effect, MCC has outsourced much of the network functionality, operations, and back-office systems to Sprint. Sprint relates that it has relationships utilizing this same market entry model with Wide Open West, Time Warner Cable, Wave Broadband, Blue Ridge Communications, and others not publicly announced serving almost 300,000 customers across over a dozen states including Illinois.

Under the arrangement between MCC and Sprint, MCC is responsible for marketing and sales, end-user billing, customer service, and the "last mile" portion of the network which includes the MCC hybrid fiber coax facilities, the same facilities it uses to provide video and broadband Internet access. Service is provided in MCC's name. Sprint provides the public switched telephone network ("PSTN") interconnection utilizing Sprint's switch (MCC does not own or provide its own switching), competitive LEC status, and the interconnection agreements it has or is negotiating with incumbent LECs. Sprint also uses existing numbers or acquires new numbers, provides all number administration functions including filing of number utilization reports with the North American Numbering Plan Administrator, and performs the porting function whether the port is from the incumbent LEC or a competitive LEC to Sprint or vice versa. Sprint is also responsible for all inter-carrier compensation, including exchange access and reciprocal compensation. Sprint provisions 9-1-1 circuits to the appropriate Public Safety Answering Points ("PSAP") through the incumbent LEC selective routers, performs 9-1-1 database administration, and negotiates contracts with PSAPs where

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<sup>1</sup> On December 15, 2004, the Commission entered an Order in Docket No. 04-0601 authorizing MCC to provide resold and facilities-based local and interexchange telecommunications services throughout Illinois. MCC is an affiliate of Mediacom Communications Corporation, a cable television provider within parts of Petitioner's serving area.

necessary. Finally, Sprint places MCC directory listings in the incumbent LEC or third party directories.

In light of the relationship between Sprint and MCC, specifically the services provided by Sprint to MCC, Petitioners contend that they have no obligation to negotiate reciprocal compensation, local number portability, or interconnection with Sprint. Petitioners maintain this position regardless of their rural carrier exemptions under Section 251(f)(1)(A).

### **III. SECTION 251(f)(1)(A) THRESHOLD INQUIRY**

Despite Petitioners' insistence to the contrary, a threshold inquiry involving Section 251(f) exists that could resolve this matter, at least in part. As previously noted, Section 251(f)(1)(A) exempts Petitioners, as rural telephone companies, from the obligations imposed in Section 251(c).<sup>2</sup> Nevertheless, Petitioners seek a declaratory ruling that it need not negotiate interconnection as required by Section 251(c), or, in the alternative, a suspension under Section 251(f)(2) of the obligation to negotiate interconnection as required by Section 251(c). Although Petitioners seek the relief regarding Section 251(c) independent of the Section 251(f)(1)(A) exemption, the Commission is not inclined to expend limited resources answering questions that are moot. Because Petitioners possess an exemption from Section 251(c), the type of arrangement Sprint has with MCC and the services provided by Sprint to MCC are irrelevant as they relate to Section 251(c). Accordingly, the Commission declines to issue a declaratory ruling regarding the obligations established by Section 251(c), which is within its discretion to do under Section 200.220(a). Nor will the Commission consider a suspension of the Section 251(c) obligations under Section 251(f)(2) given the exemption Petitioners already possess. In any event, the Commission notes Sprint's claim that it is not seeking interconnection under Section 251(c).

The next step in the inquiry is to determine whether Petitioners' exemption from Section 251(c) also covers their obligations under Section 251(b). Section 251(c)(1) obligates all incumbent LECs to negotiate in good faith terms and conditions of agreements fulfilling the obligations established for all LECs (both incumbent and competitive) in Section 251(b). Petitioners argue that their duty to negotiate the obligations of Section 251(b) arise from Section 251(c). If Section 251(c) does not apply to them, Petitioners conclude that Section 251(b) can not either. Staff, however, contends that Petitioners overstate the reach of their exemption from Section 251(c). Section 251(b), according to Staff, establishes obligations of all LECs independent from any exemption of Section 251(c) for rural incumbent LECs. Because it seeks to interconnect under Section 251(a) and (b), Sprint maintains that Section 251(f)(1) provides no exemption for Petitioners. Consistent with the FCC's treatment of this issue, the Commission finds that an exemption from Section 251(c) does not encompass the obligations imposed in Section 251(b). Section 251(f)(1)(A) provides relief only from the requirements of Section 251(c).

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<sup>2</sup> The Commission also notes that it has not received a bona fide request seeking to lift any of the Petitioners' exemption pursuant to Section 251(f)(1)(B).

In light of the limited scope of Section 251(f)(1)(A), Petitioners' declaratory ruling request regarding Section 251(b)(2) and (5) remains for the Commission's consideration. Whether Petitioners have any duty under Section 251(a) to negotiate interconnection and (b) to provide number portability and establish reciprocal compensation arrangements for the transport and termination of telecommunications under the circumstances described above is the focus of the remainder of this Order.

#### IV. PETITIONERS' DUTY TO NEGOTIATE<sup>3</sup>

##### A. Petitioners' Position

While Petitioners do not deny that Sprint is a telecommunications carrier that provides telecommunications services in various areas of Illinois, Petitioners do not believe that this fact means that Sprint is a telecommunications carrier for all purposes. Petitioners note Sprint's acknowledgement of the fact that the focus of both the state and federal definitions of telecommunications services is primarily upon the services being provided rather than the provider of those services. Petitioners point out that Section 51.703(a) of the FCC's rules provides that LECs must "establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting *telecommunications carrier*." (emphasis added) Section 153(44) of the Federal Act defines "telecommunications carrier" as:

any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under [the Federal Act] only to the extent that it is engaged in providing telecommunications services, except that the [FCC] shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

Section 153(46) of the Federal Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

Petitioners apply the Federal Act's definitions to the service that Sprint intends to provide MCC and conclude that Sprint is not acting as a telecommunications carrier. Specifically, Petitioners state that Sprint clearly will not be providing the services over which it seeks negotiation "directly" to the public. Nor, Petitioners continue, can it be said that Sprint will be providing services "to such classes of users as to be effectively available directly to the public" when it provides services to MCC which will then provide services to the public. Petitioners acknowledge that the Public Utilities Commission of Ohio ("PUCO") recently issued a decision rejecting the arguments Petitioners now

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<sup>3</sup> As noted above, when given the opportunity, Staff declined to address the merits of Petitioners' declaratory ruling request.

make. In the PUCO docket,<sup>4</sup> similarly situated small rural incumbent LECs sought exemptions under Section 251(f)(1) and (2) of the Federal Act when confronted with an arrangement between MCImetro Access Transmission Services, LCC, Intermedia Communications, Inc., and Time Warner Cable Information Services (Ohio), LLC similar to the arrangement between Sprint and MCC. Petitioners contend that the PUCO is simply wrong.

In support of its view of the PUCO decision, Petitioners state that both the FCC and United States Court of Appeals for the District of Columbia Circuit have rejected the argument that a service can be interpreted as effectively available directly to the public by looking to how a private carriers' telecommunications carrier customers use that service. According to Petitioners, in *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (1999), the D.C. Circuit affirmed the FCC's conclusion that the term "telecommunications carrier" under the Federal Act incorporates the preexisting definition of "common carrier" established by the earlier case of *National Association of Regulatory Commissioners v. FCC* ("NARUC"), 525 F.2d 630 (D.C. Cir. 1976). (See *Virgin Islands Telephone Corp.*, 198 F.3d at 925-26)

Under the *NARUC* test, Petitioners state that "common carrier" status turns on whether the carrier "undertakes to carry for all people indifferently." (*Id.* at 926 (citing *NARUC*, 525 F.2d at 642)) In *Virgin Islands Telephone*, the court reviewed an FCC finding that an AT&T affiliate called AT&T-SSI was not acting as a common carrier by making capacity on its submarine cables available to other telecommunications providers that would, in turn, make that capacity available through services provided to end-user customers. The FCC had concluded that a service will not be considered "available to the public" or "effectively available to a substantial portion of the public" if it is "provided only for internal use or only to a specified class of eligible users under the Commission's rules." The FCC also stated that "whether a service is effectively available directly to the public depends on the type, nature, and scope of users for whom the service is intended and whether it is available to 'a significantly restricted class of users.'" (*Virgin Islands Telephone*, 198 F.3d at 924) The FCC rejected the argument that AT&T-SSI would be making a service effectively available directly to the public because AT&T-SSI's *customers* would use the capacity to provide a service to the public, noting that "[s]uch an interpretation is contrary to the plain language of the [Federal Act] by focusing on the service offerings AT&T-SSI's customers may make rather than on what AT&T-SSI will offer." (*Id.*)

In reaffirming the *NARUC* test, Petitioners note that the FCC specifically rejected the inclusion of a "carrier's carrier" in the definition of telecommunications carrier and specifically rejected the suggestion that the Federal Act "introduce[d] a new concept whereby we must look to the customers' customers to determine the status of a carrier." (*Id.* at 926) According to the court, Petitioners continue, the key to common carrier status is "the characteristic of holding oneself out to serve indiscriminately." (*Id.* at 927)

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<sup>4</sup> *In the Matter of the Application and Petition in Accordance With Section II.A.2.b. of the Local Guidelines Filed by: The Champaign Telephone Company et al.* 04-1494-TP-UNC et seq., Finding and Order, January 26, 2005; Order on Rehearing, April 13, 2005.

(quoting *NARUC*, 525 F.2d at 642) Petitioners state that the court approved the FCC's decision to contrast such common carrier/telecommunications carrier behavior to "private carrier" activity under which a carrier makes individualized decisions about whether and on what terms to serve done under contract between carriers. (*Virgin Islands Telephone Corp.*, 198 F.3d at 925)

Under this analysis, Petitioners argue that Sprint is clearly acting as a private carrier in its dealings with MCC. Petitioners add that it makes no difference whether Sprint is acting as a transiting carrier or a private switching and back office service provider. So long as Sprint is not providing service to end-users or making its service available indiscriminately to all takers, Petitioners aver that Sprint is providing private carrier or vendor services to MCC and is not providing service to the public. As a private carrier, Petitioners maintain that Sprint is not a telecommunications carrier and is not seeking to negotiate for the provision of telecommunications service in Petitioners' respective serving areas.

Petitioners also argue that Sprint's definition of telecommunications carrier does not comply with common sense. For example, even though Sprint seeks to negotiate reciprocal compensation, Petitioners assert that Sprint will originate no traffic on which reciprocal compensation will be owed and will terminate no traffic on which it will be owing. Any such traffic, Petitioners continue, would be MCC's and MCC should be primarily responsible. Similarly, while Sprint seeks an agreement on local number portability, the entity to which such numbers would be ported to and portable from would be MCC. Petitioners contend that MCC should be responsible for such obligations directly to it. The same is true, Petitioners add, with dialing parity. In all cases, Petitioners argue, the contractual rights that Sprint is seeking would be properly negotiated by MCC and the contractual obligations for which they will be negotiating should be obligations on MCC for which they should have rights enforceable against MCC. Petitioners aver that the overall design of subsections (b) and (c) of Section 251 is to establish contractual privity between the parties that have the reciprocal rights and obligations. Petitioners do not believe that it makes any sense to interpose a back office service provider into the middle of that relationship. If MCC intends to provide telecommunications services, Petitioners maintain that MCC should be the one seeking negotiations.

Moreover, if taken to its extreme, Petitioners claim that Sprint's position would mean that every vendor whose services are incorporated into a telecommunications service is a "telecommunications carrier." This could not only allow every vendor in the industry to demand negotiations, Petitioners point out, it would also impose a number of regulatory burdens on vendors that have no ability to meet those burdens. Nor, according to Petitioners, does it make sense that a carrier that is certificated to provide telecommunications services somewhere (or even actually provides telecommunications services somewhere) is therefore entitled to negotiate agreements everywhere. In order for Section 251 to make practical sense, Petitioners contend that it must be limited to negotiations with carriers that have some plan to be a telecommunications carrier and provide telecommunications services within the serving



area of the LEC with which they seek to negotiate. Petitioners insist that Sprint simply does not meet those threshold conditions, whether measured under the terms of the Federal Act as interpreted by the FCC and federal courts or measured by a simple common sense reading of the obligations of the Federal Act.

Because Sprint will not be acting as a telecommunications carrier providing telecommunications services within the meaning of the Federal Act, Petitioners maintain that Sprint is the wrong entity to be negotiating the reciprocal compensation and local number portability arrangement that Sprint is seeking. Petitioners characterize Sprint's claim to be a telecommunications carrier and its reliance on MCC's intent to provide broadband voice information services in competition with Petitioners as a shell game. They state that the only role Sprint truly proposes to play under the agreement it proposes to negotiate with them is as private vendor to MCC.

So that their position is clear, Petitioners expressly state that they have no objection to the "business arrangement" that they understand to exist between Sprint and MCC. If MCC, whether directly or through its affiliates, intends to provide telecommunications services and be a telecommunications carrier in Illinois and in their respective serving areas, Petitioners asserts that this entire issue would be avoided if, as the Federal Act contemplates, MCC initiated the negotiation process with them. Petitioners contend that the absence of the purported local service provider overshadows what services Sprint may or may not provide. In their opinion, there is no apparent legitimate reason not to impose on the purported service provider the obligation to initiate and conduct negotiations and be a party to the resulting agreement, no matter whether it intends to self-provision or rely on third parties such as Sprint.

## **B. Sprint's Position**

Sprint maintains that Petitioners are obligated by the Federal Act to interconnect with it and provide number portability and establish reciprocal compensation arrangements despite the fact that MCC is the entity directly serving the end-user. Sprint relates that it has entered into agreements with telecommunications service providers that intend to compete with the Petitioners' local voice services. These agreements require Sprint to provide certain services, including but not limited to number acquisition and administration, telephone number assignment, including local routing numbers, port requests, switching, and transport of local calls, and exchange access to and from the PSTN, including calls to 9-1-1 for end-users.

Like Petitioners, Sprint too relies on the definition of "telecommunications service" in Section 153(46) of the Federal Act to support its position. Sprint emphasizes the latter part of the definition ("..., or to such class of users as to be effectively available directly to the public, ...") and notes the PUCO's recent decision relying on this portion of the definition.<sup>5</sup> As discussed above, the PUCO rejected arguments similar to those raised by Petitioners in a case involving services similar to those which Sprint intends to provide to MCC. The PUCO specifically found that MCI was a

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<sup>5</sup> See Footnote No. 4.

telecommunications carrier and that the rural incumbent LECs had a duty to interconnect with MCI. The PUCO also concluded that MCI was acting in a role no different than other telecommunications carriers whose network could interconnect with the rural incumbent LECs so that traffic is terminated to and from each network and across networks. Like MCI, Sprint contends that its proposed interconnection with Petitioners places it in the same position as other intermediate carriers whose interconnections terminate traffic to and from each network and across networks. Because its services will be effectively available to the public (through MCC), Sprint maintains that it is a telecommunications carrier offering telecommunications services.

Because it is telecommunications carrier, Sprint argues further that Section 251(a) of the Federal Act establishes an independent basis for interconnection. Section 251(a) requires each telecommunications carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Sprint reports that neither subsection (f)(1) nor (f)(2) of Section 251 provide Petitioners with an exemption from their obligation to allow for direct or indirect interconnection. Moreover, Sprint points out that it has not requested interconnection pursuant to Section 251(c). In this regard, Sprint is a facilities-based carrier that does not require access to Section 251(c) provisions such as unbundled network elements, collocation, and resale. Sprint states that it is much like a wireless carrier in that it owns all of its own facilities and, therefore, does not need to take advantage of the rights granted to telecommunications carriers under Section 251(c) to use an incumbent LEC's network to compete against the incumbent LEC.

Sprint adds that Section 251(a) does not specifically mention the types of traffic to be exchanged nor does it exclude certain types of traffic. In this regard, Sprint states that Congress has provided definitions of not only "telephone exchange service," but also "telephone toll service."<sup>6</sup> Congress, Sprint continues, could easily have excluded any one of these services or limited Section 251(a)'s applicability to any one of these services, but it did not. Sprint contends that Petitioners may not, therefore, impose a restriction on Sprint that is not contained in the statute. To allow Petitioners to do so, Sprint argues, would undermine one of the enduring tenants of statutory construction – that is – to give effect, if possible, to every clause and word of a statute. Accordingly, Sprint concludes that Petitioners must interconnect either directly or indirectly with it for the exchange of local traffic pursuant to Section 251(a).

Not only does the plain language of Section 251(a) require Petitioners to interconnect with Sprint independent of Section 251(c), Sprint observes that it appears the Commission has approved an agreement between Geneseo Telephone Company and a wireless carrier, Nextel Partners, that contains terms for both direct and indirect interconnection and reciprocal compensation without reference to Section 251(a) of the Federal Act.<sup>7</sup> Of particular interest to Sprint is the part of the agreement that requires

<sup>6</sup> 47 U.S.C. §§ 153(47) and 153(48).

<sup>7</sup> See Order entered on April 21, 2004 and Amendatory Order entered on May 26, 2004 in Docket No. 04-0120; *NPCR, Inc. d/b/a Nextel Partners, as agent for Nextel WIP License. Corp. and Nextel WIP*

the originating party to pay any transiting charges when the parties exchange traffic on an indirect basis.<sup>8</sup> Sprint states that this is exactly the type of arrangement Sprint seeks to enter with Petitioners. Sprint is adamant that Petitioners should not be permitted to discriminate against it. Indeed, Sprint insists, any such discrimination would be antithetical to the FCC's policy pronouncement that "all telecommunications carriers that compete with each other should be treated alike regardless of the technology used..."<sup>9</sup> Both it and Nextel Partners, Sprint points out, are telecommunications carriers that are obligated to comply with and are entitled to all the rights and privileges that result from Section 251(a).

### C. Commission Conclusion

Sprint and MCC's interest in competing in certain of the more rural exchanges in Illinois is significant in that it represents one of the first, if not the first, competitive landline ventures into the relevant exchanges. To determine if Petitioners have a duty to negotiate interconnection with Sprint, the Commission must first evaluate whether Sprint, for purposes of its arrangement with MCC, is a telecommunications carrier as defined by federal law. A telecommunications carrier is "any provider of telecommunications services." 47 U.S.C. §153 (44). Federal law defines telecommunications services as "the offering of telecommunications for a fee directly to the public, or to classes of users as to be effectively available to the public, regardless of facilities used"...a telecommunications carrier is a common carrier to the extent it provides telecommunications services. 47 U.S.C. §153 (46).

The parties offer a number of court and public utility commission decisions to aid us in interpreting these definitions, relying heavily on *Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) ("Virgin Islands").<sup>10</sup> The *Virgin Islands* decision distinguishes between private carriers and common carriers, affirming the FCC's determination that a telecommunications carrier must be a common carrier. *Id.* To be considered a common carrier, an entity must meet a two-pronged test as set forth in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I"), followed by *United States Telecom Ass'n v. FCC*, 295 F. 3d 1326, 1329 (D.C. Cir. 1976) ("USTA"). First, the Commission must consider whether Sprint holds itself out to serve all potential users indifferently. *Id.* at 1329, 642. The USTA decision further clarified this prong, by noting that a carrier offering its services only to a defined class of users may still be considered a common carrier if it holds itself out to indiscriminately serve all within that class. *USTA* at 1333.

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*Extension Corp. and Geneseo Telephone Company; Joint Petition for Approval of Interconnection Agreement between Geneseo Telephone Company and NPCR, Inc. pursuant to 47 U.S.C. § 252.*

<sup>8</sup>See *Id.* at Section 4.5.

<sup>9</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, ¶ 993 (1996) (*Local Competition Order*) (subsequent history omitted).

<sup>10</sup> In *Virgin Islands*, the court upheld the FCC's decision to classify AT&T-SSI as a private carrier, finding the FCC's equating a telecommunications carrier with a common carrier to be reasonable. *Virgin Islands* at 922.

Second, the Commission must determine whether Sprint allows customers to transmit information of the customer's own choosing. *Id at 1329, 642.*

Petitioners insist that Sprint is a private carrier. They argue because MCC will be providing the "last mile," MCC is providing services to the public, not Sprint. Sprint, however, asserts that it will provide all public switched telephone network ("PSTN") interconnection, use of existing numbers and all number administration functions, perform the porting function, provision 9-1-1 circuits to the appropriate public safety answering point ("PSAP"), administer 9-1-1 databases and placement of directory listings with ILEC or other directories. *Burt affidavit* at 4. Sprint argues that it indiscriminately offers and provides these services to other cable companies, including Wide Open West, Time Warner Cable, Wave Broadband and others. *Burt affidavit* at 3. Sprint further clarifies this point in James D. Patterson's affidavit.<sup>11</sup> According to Mr. Patterson, Sprint offers the services at issue here indifferently to entities capable of providing their own "last mile" facilities. *Patterson affidavit* at 3. Sprint also insists it meets the second prong of the *NARUC* /test by not altering the content of the voice communications between end users.

The Commission finds that Sprint is a common carrier/telecommunications carrier. While Sprint does not offer its services directly to the public, it does indiscriminately offer its services to a class of users so as to be effectively available to the public, meaning it provides services to those capable of providing their own "last mile" facilities. Thus, Sprint meets the first prong of the *NARUC* /test. Sprint also passes the second prong of the *NARUC* /test by not altering the content of voice communications by end users. Furthermore, the providers of the last mile, in this case MCC, make the service available to anyone in their respective service territories, thus making Sprint's services effectively available to the public.

Petitioners attempt to persuade the Commission to follow the Iowa Public Utilities Board's ("IPUB") interpretation of the *Virgin Islands* decision. IPUB recently dealt with these issues, finding that rural ILECs have no duty to negotiate interconnection with Sprint. *Sprint Communications Company v. Ace Communications Group, et al.*, Docket No. ARB-05-2 (IPUB 2005). IPUB found Sprint only intended to offer its services to its "private business partners," not on a common carrier basis. We respectfully disagree with IPUB's interpretation, based on the above analysis.

Additionally, the Commission notes its previous decision in the *SCC Arbitration Decision*, Docket No. 00-0769 ("SCC"). In SCC, the Commission concluded that SCC, a 9-1-1 and emergency services provider, was a common carrier even though it provided its services directly to ILECs, CLECs, certain State agencies, wireless operators, emergency warning systems and emergency roadside assistance programs. The Commission reached this conclusion even though SCC did not directly serve the general public. The key was the fact that SCC made its services indiscriminately available to those who could use its services. SCC at 8. In the instant docket, we

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<sup>11</sup> Sprint supplied Mr. Patterson's affidavit with its Brief on Exceptions.

conclude that Sprint also makes its services indiscriminately available to those who could use its services.

The Commission also notes that we previously analyzed the *Virgin Islands* decision in SCC and found *Virgin Islands* to be factually dissimilar. In SCC, the Commission stated AT&T-SSI failed to meet either prong of the *NARUC I* test, as its main service was to “provide hardware, lay cable and lease space to cable consortia, common carriers and large businesses with the capacity to interconnect to its proposed cable on an individualized basis.” SCC at 8. Essentially, AT&T-SSI was providing bulk capacity. We believe this distinction is relevant to this proceeding as well. Here, Sprint is not offering bulk capacity. It is offering a host of technical functions, including 9-1-1 provisioning services, to any entity that provides its own “last mile” facilities.

At the eleventh hour, Petitioners filed a Motion to Cite Additional Authority based on a decision handed down by the U.S. Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*, Docket No. 04-0277 (“Brand X”). Both Sprint and Staff responded. Given the timing of this decision and the limited opportunity to explore it, the Commission declines to consider the effect, if any, of the *Brand X* decision at this time.

Since we reached the conclusion that Sprint is a telecommunications carrier for purposes of this docket, the Commission must now determine if 251(a) requires Petitioners to negotiate with Sprint. 251(a)(1) requires a telecommunications carrier “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. §251(a)(1). This section contains no restrictions on who may interconnect with whom. Because there are no restrictions, the Commission finds that Petitioners must negotiate the terms and conditions for interconnection with Sprint.

In addition, it seems that the Commission’s findings are greatly serving the public interest. Competition in the telecommunications industry has brought about significant technological advances that few who live in rural areas in Illinois have been able to take advantage of. The type of arrangement between MCC and Sprint potentially allows those in rural areas to benefit from the competitive telecommunications market.

Turning to Petitioners’ duties under 251(b)(2) and (5) and whether the Commission should grant a waiver of these duties under 251(f)(2). 251(b)(2) governs a LECs’ duty to provide number portability. 251(b)(5) covers a LECs’ duty to provide reciprocal compensation. Sprint, through its agreement with MCC, intends to take responsibility for these services for MCC’s customers. Petitioners, as LECs, would be obliged to negotiate with Sprint on these two provisions if 251(f)(2) is not applicable. At this time, the Commission does not have sufficient information before it based on the record in this docket to make a determination as to whether Petitioners may receive a waiver of its 251(b)(2) and (5) obligations under 251(f)(2). These issues should be addressed in the newly-initiated arbitration between Sprint and Petitioners in Docket No.

05-0402. The parties are also free to fully brief the *Brand X* decision in Docket No. 05-0402.

Based on the above discussion, the Commission denies Petitioners' request for a declaratory ruling. Any issues not addressed by this decision should be addressed in Docket No. 05-0402. The Commission, in favoring Sprint's position on the right to interconnect with Petitioners, fully expects Sprint to abide by its sworn affidavits, especially its responsibility for all intercarrier compensation arrangements. The Commission also fully expects Sprint to continue to indiscriminately offer these services, as its affidavits state, to those entities that are capable of providing the "last mile."

## **V. FINDINGS AND ORDERING PARAGRAPHS**

The Commission, having considered the entire record herein, is of the opinion and finds that:

- (1) Petitioners provide local exchange telecommunications services as defined in Section 13-204 of the Act;
- (2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;
- (3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and law;
- (4) as rural telephone companies, Petitioners possess a rural exemption under Section 251(f)(1)(A) of the Federal Act from the requirements of Section 251(c) of the Federal Act;
- (5) in light of Petitioners' exemption from the requirements of Section 251(c) of the Federal Act, the Commission need not rule on Petitioners' requests regarding its obligations under Section 251(c);
- (6) given the manner in which Sprint proposes to serve MCC, Sprint is a telecommunications carrier in this instance with which Petitioners must negotiate under subsections (a) and (b) of Section 251 of the Federal Act;
- (7) in light of an insufficient record, declines to make a ruling regarding Petitioners' requests under Section 251(f)(2) of the Federal Act in this Order;
- (8) the determinations in these matters are limited to the facts and circumstances presented to, and considered by, the Commission herein, and are without prejudice to any positions, arguments, or evidence that may be advanced in any other proceeding; and

- (9) all motions, petitions, objections, and other matters in this proceeding which remain unresolved should be disposed of consistent with the conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that because Sprint Communications, L.P. d/b/a Sprint Communications Company L.P. is a "telecommunications carrier," Petitioners have an obligation to negotiate with Sprint Communications, L.P. d/b/a Sprint Communications Company L.P., or any similarly situated entity, under subsections (a) and (b) of Section 251 of the federal Telecommunications Act.

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceeding which remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that subject to the provisions of 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 13th day of July, 2005.

(SIGNED) EDWARD C. HURLEY

Chairman